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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1141

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, Et Al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Denver and Rio Grande Western Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on December 28, 1966.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of Judgment of the District Court, which were not officially reported, appear at pages 132-142 of the record. The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on December 28, 1966, and is appended hereto as Appendix A, *infra*. The petition of the Denver and Rio Grande Western Railroad Company for rehearing was denied on February 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does an award of the National Railroad Adjustment Board, based on the Board's jurisdiction over contract interpretation disputes, fail to confine itself to matters within the Board's jurisdiction, where:

(a) the award requires the carrier to pay each claimant a full day's pay for each claimed violation of the collective bargaining agreement;

(b) there is no contract provision providng for such damages and the Board does not purport to rely upon the contract in awarding such damages;

(c) there is no evidence of an established custom and practice contemplating damages of such a nature; and

(d) there is absolutely no evidence of any actual loss sustained by the individual claimants?

2. Where a district court in an action to enforce an award of the National Railroad Adjustment Board, finds and concludes that:

(a) the requirement of the award that each claimant be paid a full day's pay for each claimed contract violation does not purport to be and is not based upon or supported by the contract in question;

(b) the payments required by the award do not purport to be and are not based upon any established custom and practice; and that

(c) each claimant was fully compensated for all time on duty and thus suffered no actual loss as a result of the claimed contract violations;

may the Court reduce the required payments to a nominal amount or do the 1966 amendments to the Railway Labor Act (Public Law 89-456) prohibit such modification of the award?

3. Did the Court of Appeals err in giving retroactive effect to Public Law 89-456 where:

(a) The provisions of the statute and its legislative history do not indicate any Congressional intention that the enactment should be retroactively effective;

(b) The statute does not deprive the district court of jurisdiction in the type of case pending herein, although the Court of Appeals mistakenly assumed the contrary to be the fact; and

(c) Retroactive application of the statute would deprive petitioner of substantial rights?

4. Does Public Law 89-456 deprive carriers of their common law right to a jury trial in contract disputes where the value in controversy exceeds twenty dollars, contrary to the provisions of the Seventh Amendment to the Constitution of the United States?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are the 1966 amendments to the Railway Labor Act (Public Law 89-456), and Section 3 First (m) and (p) of the Railway Labor Act prior to the 1966 Amendments (49 U.S.C.A. §§ 153 First (m) and (p)). The Seventh Amendment to the Constitution of the United States is also involved. These statutory and constitutional provisions are printed in Appendix B hereto.

STATEMENT

This action was brought by the Brotherhood of Railroad Trainmen against The Denver and Rio Grande Western Railroad Company under § 3 First (p) of the Railway Labor Act to enforce Award 19389 of the National Railroad Adjustment Board, First Division. In addition to the Brotherhood of Railroad Trainmen, eight individuals employed as conductors and brakemen by The Denver and Rio Grande Western were plaintiffs in the District Court, appellants in the Court of Appeals, and are respondents here. The Denver and Rio Grande Western is a common carrier by railroad operating a railroad system which extends from Denver, Colorado, Salt Lake City, and Ogden, Utah.

The dispute which eventuated in Award 19389 concerns the use of head brakemen, who ordinarily ride in the locomotive with the engineer and fireman, to accompany the locomotive a short distance from the point where the train is "yarded" to a designated "tie-up" track. The controversy first arose when the Rio Grande renovated its terminal facilities in the Denver area and established a new yard referred to as the North Yard (R. 75). Prior to these changes, the crews of inbound freight trains had yarded their trains at Burnham Yard in the Denver Terminal and had then accompanied the engine and the caboose to a so-called tie-up track where hostlers and shop employees were available (R. 75). When the North Yard was placed in operation, the Rio Grande issued instructions requiring the head brakeman to accompany the engine, along with the engine crew, from the point where the train was yarded to the designated tie-up track (R. 75). The designated tie-up point was adjacent to the yard office where the head brakeman and other crew members registered off-duty (R. 75). Generally, this service requires only a few

minutes of the head brakeman's time. While he is thus engaged, the head brakeman is under pay and is compensated in accordance with several provisions of the collective bargaining agreement (R. 207-208; 222-223; 232-236; 275-277). Employees represented by the Brotherhood immediately filed claims contending that the "herding" requirement was in violation of the agreement between the parties (R. 82-88). Following negotiations with respect thereto, the Brotherhood and the Rio Grande agreed to submit the claims to a Special Board of Adjustment (R. 88).

The Special Board of Adjustment, created by agreement between the Brotherhood and the Rio Grande, was directed to dispose of the claims submitted to it, including those involving the herding practice at the North Denver Yard. The parties specifically agreed that its awards were to be final and binding (R. 94). On June 23, 1952, the Special Board of Adjustment rendered its award denying the claims. The neutral referee, who rendered the award, held that the practice of the Rio Grande at its North Yard in Denver was proper and in full conformity with the provisions of the agreement. The Rio Grande, which had discontinued the herding practice at Denver while the dispute was pending before the Special Board, reinstated the requirement which had been approved by the Special Board (R. 136). The Brotherhood, however, refused to be bound by the award of the Special Board and immediately commenced filing additional claims with respect to the same practice (R. 64-65). Since the Special Board, established by agreement of the parties, had found the practice to be proper under the existing agreement, the Rio Grande denied the claims.[1] The Brotherhood then submitted the claims to

[1] In the proceedings in the District Court, the Brotherhood conceded that the claims denied by the Special Board of Adjustment and those subsequently filed with the National Railroad Adjustment Board were virtually identical (R. 88, 289-290).

the First Division of the National Railroad Adjustment Board.

The Adjustment Board, which is composed of five carrier members and five labor members, failed to agree on an award, and a Referee was selected to break the deadlock (R. 136). On January 20, 1960, the Referee rendered Award 19389 sustaining the claims (R. 81). A dissenting opinion was filed by the five carrier members of the Adjustment Board and a supporting opinion by the labor members (see R. 129).

Following the rendition of Award 19389, the Rio Grande discontinued the practice of using head brakemen to perform the North Yard "herding" work in question, but refused to pay the claims for an extra day's pay for each alleged violation (R. 136). Instead of filing a statutory enforcement suit, the Brotherhood called a strike to compel the Rio Grande to pay these claims. The District Court granted an injunction against the strike, which was affirmed on appeal. *Denver and Rio Grande Western R.* v. *Brotherhood of Railroad Trainmen,* 185 F. Supp. 369 (D. Colo., 1960), affirmed, 290 F. 2d 266 (10th Cir. 1961), certiorari denied, 366 U.S. 966.

The present lawsuit for enforcement of the monetary aspects of Award 19389 was filed on January 15, 1962 (R. 8). The Rio Grande defended on the grounds that (1) Award 19389 was erroneous and unenforceable because the claims therein sustained had previously been decided adversely to respondents by the final and binding award of the Special Board of Adjustment,[1] and that (2) the allowance of a full day's pay for each alleged violation was improper since the claimants had been fully compensated for

[1] The Special Board was established purusant to Section 3, Second of the Railway Labor Act (45 U.S.C.A. § 153 Second) (R. 92-95).

all time on duty, including the time required to herd engines (R. 13).

The District Court concluded that it should not "substitute its judgment for that of the Neutral Referee's on the substantive issues underlying Award No. 19389" (R. 137). With respect to the allowance of a full day's pay for each claimed violation, however, the Court held that the claimants should only receive nominal damages since the record did not disclose any contractual or evidentiary support for the allowances required by the award (R. 137-140). Accordingly, the District Court awarded the appellants entered judgment for nominal damages although the claimants had been compensated for their "herding" work under other provisions of the collective bargaining agreement (R. 138-140).

The Brotherhood appealed from the judgment below insofar as it awarded only nominal damages of $28,000 (R. 141, 144). The Rio Grande cross-appealed because of the District Court's failure to hold that Award 19389 was barred by the Award of the Special Board of Adjustment (R. 145).

The case was fully briefed, argued and submitted for decision in the Court of Appeals by May 20, 1966. One month later (June 20, 1966) Congress enacted Public Law 89-456, which amended certain provisions of the Railway Labor Act relating to the National Railroad Adjustment Board. With respect to actions to enforce awards of the Board, Sections 3 First (m) and (p) were amended to make all awards of the Board final and binding except for failure of the award "to conform or confine itself to matters within the scope of the division's jurisdiction . . ." (Public Law 89-456 Sec. 2(d)). On July 25, 1966, the Brotherhood sought and obtained leave from the Court of Appeals to file a supplemental brief urging that the amendments to the Railway Labor Act were retroactively applicable to the

judgment previously entered by the District Court. Petitioner was given eleven days to file a reply to this supplemental brief. On December 28, 1966, the Court of Appeals decided that the amendments to the Railway Labor Act should be applied retroactively and, on the basis of its interpretation of the amended statute, reversed the judgment of the District Court. The District Court was not afforded any opportunity to reconsider its decision in the light of the subsequent amendments to the Railway Labor Act. Instead, it was ordered "to enforce the award" (App. A, p. 31).

Although the judgment of the District Court had been entered well over a year prior to the enactment of Public Law 89-456, the Court of Appeals nevertheless concluded that the propriety of that determination must be tested by reference to the amended statute. Moreover, in the process of testing the District Court's judgment by these subsequent developments, the Court of Appeals failed to discuss the significance of the District Court's findings and conclusions under the newly enacted review standards. The Court instead suggested that the amendments to the Act accomplished a "repeal of the district court's jurisdiction to review money awards" (App. A, p. 29). The Court of Appeals apparently concluded, therefore, that the monetary aspects of the award could not be disturbed despite the findings and conclusions of the District Court that the required payments were entirely without contractual or evidentiary support.

The decision of the Court of Appeals concerns fundamental rights of employees and employers under the recent amendments to the Railway Labor Act. As the following discussion will show, the opinion in question clearly reflects a mistaken view of the purpose and effect of these statutory provisions. A determination by this Court of

the important questions of federal law thus raised is urgently needed.

REASONS FOR GRANTING WRIT

(1) The decision of the Court of Appeals completely vitiates the judicial review provided by the 1966 amendments to the Railway Labor Act with respect to awards of the National Railroad Adjustment Board.

One of the crucial issues decided by the Court of Appeals involves the scope of review of awards of the National Railroad Adjustment Board under the terms of the 1966 amendments to the Railway Labor Act. Petitioner urged in its supplemental brief in the Court of Appeals that even if the amendment to the Railway Labor Act enacted subsequent to the submission of the case to that Court should be retroactively applicable, the monetary aspect of the award of the Board did not confine itself to matters within the Board's jurisdiction and was thus properly set aside by the District Court. The statutory provision upon which petitioner relied appears in § 2(d) of Public Law 89-456, providing that an order of the Adjustment Board may be set aside in whole or in part "for failure of the order to conform or confine itself to matters within the scope of the division's jurisdiction" (App. B, p. 34).

Petitioner also cited the legislative history of Public Law 89-456, including the following excerpt from the Report of the Senate Committee regarding the scope of review:

> "The Committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award 'arbitrariness or capriciousness' on the part of the Board. The Committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as

> being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or fact, and the committee intends that, under this bill the courts will have that power." (S. Rep. No. 1201, 89th Cong., 2nd Sess. 3 (1966).)

On the basis of these authorities, petitioner contended that the requirement of the award that each claimant be allowed a full day's pay on each occasion of a claimed contract violation was invalid. Particular emphasis was placed on the District Court's findings that the money aspect of the award was not based on any provision of the collective bargaining agreement and was entirely without evidentiary support. It was this aspect of the award which the District Court set aside and for which it substituted an allowance of nominal damages. The Court of Appeals' discussion and disposition of the issue thus raised is as follows:

> "So, too, the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of damages, like the application of affirmative defenses, offers no jurisdictional question." (App. A, p. 30.)

This cursory dismissal of petitioner's argument makes no reference at all to the basis upon which the District Court reduced the award of damages to a nominal amount and the jurisdictional significance of the findings and conclusions which that Court made to support its action. Petitioner respectfully submits that the award of a full day's pay for each claimed violation which was held by the District Court to be without contractual or factual support, does present jurisdictional questions and that the District Court's resolution of those questions even when considered in the context of the 1966 amendments, was eminently correct.

Basic to this entire discussion is the nature of the jurisdiction of the National Railroad Adjustment Board. Shortly after the Board was created by the 1934 amendments to the Railway Labor Act, this Court emphasized the language of the statute limiting the Board's authority to the resolution of disputes growing out of "the interpretation or application of agreements concerning rates of pay, rules or working conditions" (45 U.S.C.A. § 3, First (i)). *Order of Ry. Conductors of America* v. *Pitney,* 326 U.S. 561; *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711, 327 U.S. 661. This is the entire extent of the jurisdiction of the Adjustment Board, as the courts have repeatedly held. Accordingly any award rendered by the Board must be limited to and must be based on the contract rights of the parties. This Court in *United Steelworkers* v. *Enterprise Wheel & Car Corporation,* 363 U.S. 593, described the jurisdiction of arbitrators in contract interpretation disputes and stated the relevant principle as follows:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." (363 U.S. 597.)[1]

The significant question, therefore, is whether the monetary aspect of the award of the National Railroad Adjustment Board, which the Brotherhood seeks to enforce, is based on provisions of the collective bargaining agreement. Unless this question can be answered affirmatively, it is

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[1] The arbitrator's jurisdiction was stated in terms of resolving disputes "as to the meaning and application" of the agreement and his award was to be "final and binding" (363 U.S. 594). This phraseology is comparable to that used in the Railway Labor Act.

indisputable that the award does not confine itself to matters within the jurisdiction of the Board.

In seeking an answer to this question, we respectfully suggest that the findings and conclusions of the District Court clearly establish that the award of a day's pay for each claimed violation of the agreement is outside the scope of the Adjustment Board's jurisdiction.

Neither the opinion of the Neutral Referee nor the recitals of the award identify any provisions of the collective bargaining agreement as the basis for awarding a full day's pay to each claimant for each alleged violation of the agreement. There is no suggestion anywhere in the documents evidencing the Board's decision that the agreement between the parties constitutes the basis for the required payments. With respect to this issue, the District Court found that the collective bargaining agreement did not contain such a provision (R. 137-138), and that "The award of a full day's pay is neither authorized by the collective bargaining agreement nor justified by the facts in evidence . . . there is no contractual basis for such an award" (R. 139-140). In *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, this Court emphasized the importance and jurisdictional significance of such findings, stating:

> "The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract." (p. 598.)

The District Court made the required findings in the present case and there is no suggestion in the opinion of the Court of Appeals that these findings are erroneous. Consequently, the findings of the District Court fully establish the proposition that the Board's award does not derive its essence

from the collective bargaining agreement and thus does not confine itself to matters within the Board's jurisdiction.

During the proceedings in the District Court, the Brotherhood sought to remedy the absence of contractual support for the monetary award by attempting to establish a custom and practice of paying a full day's pay for each violation of a collective bargaining agreement in the railroad industry and a finding to that effect was requested (R. 122). Referring to the award and the asserted custom and practice, the District Court stated:

> "The Sembower award in the instant case does not make a specific finding of custom, but the Court has been requested to do so by the Brotherhood. There is some evidence before us of a full day's pay having been granted by the carrier for similar violations of the collective bargaining agreement. These settlements differ from the situation at hand in two highly significant respects. First, they involved smaller numbers of claimants, totalling only a fraction of the payments sought under the present award. Also, they were all made prior to Denver and Rio Grande v. Brotherhood of Railroad Trainmen, 185 Supp. 369 (D.Colo. 1960), affirmed, 290 F.2d 266 (10th Cir. 1961), cert. denied, 366 U.S. 966 (1961), which held that an enforcement suit is the exclusive remedy to enforce an Adjustment Board award." (R. 138.)

The District Court found, however, that "the custom of a day's pay has not been established. . ." (R. 139).

Having thus determined that the monetary aspect of the award was not based on the contract between the parties or on any established custom, the District Court then considered the evidence relating to any actual loss suffered by the claimants as a consequence of the alleged violations of the agreement. The evidence on this point clearly established, and the District Court found, that the claimants

had been fully compensated for all time on duty, including the time devoted to herding engines, and thus had suffered no actual loss (R. 140). There was absolutely no evidence of actual loss, either in the record before the Board or in the record before the Court. Accordingly the District Court reduced the amount of the award to nominal damages.

It would seem indisputable that this action by the District Court was eminently sound and in full accord with the scope of review of Adjustment Board awards contemplated by the 1966 amendments to the Railway Labor Act. As to the jurisdictional issue, the precise findings of the Court clearly establish that the monetary aspects of the award are not based on the Board's interpretation or application of the collective bargaining agreement which is the totality of the Board's jurisdiction under the statute. It is equally clear that the monetary aspects of the award are not supported by any evidence before the Board or the District Court. The award is thus within the scope of review described by the Senate Committee in its report on Public Law 89-456. As the Committee emphasized in the excerpt quoted above:

> ". . . a Federal Court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or fact, and the Committee intends that under this bill, the courts will have that power." (S. Rep. No. 1201, 89th Cong., 2nd Sess. 3 (1966).)

It would be difficult to imagine a more appropriate award for application of the review authority contemplated by Congress.

The invalidity of the monetary aspects of the award of the Board under the 1966 amendments to the Railway Labor Act and the correctness of the District Court's judgment are also established by opinion of the Court of Appeals in *Brotherhood of Railroad Trainmen* v. *Denver and*

Rio Grande Western R. Co., 338 F. 2d 407, 409, 410 (10th Cir. 1964). That proceeding involved a companion award of the Adjustment Board, and the same collective bargaining agreement between the Brotherhood and the Rio Grande. In that case, as in the present case, the award required an allowance of a full day's pay for each claimed violation of the agreement. The District Court reduced the monetary amount to nominal damages and on appeal, the Court affirmed, stating:

> "The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & Sons v. United States, 332 U.S. 407, 413, 68 S.Ct. 123, 92 L.Ed. 32. And if, as counsel for the Brotherhood contends, there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R. Co. v. Brotherhood of Ry. Clerks, 4 Cir. 210 F. 2d 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F. 2d 49, 53-54, 48 A.L.R. 2d 1285. Absent actual loss, recovery is properly limited to nominal damages. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 10 Cir. 113 F. 2d 308; Norwood Lumber Corp. v. McKean, 3 Cir. 153 F.2d 753; 5 Williston, Contracts (rev. ed.) § 1339A."

This, we submit, is a precise holding that the award here involved is not confined to matters within the Board's

jurisdiction, and was properly reduced to nominal damages by the District Court. Even under the 1966 amendment the District Court was fully authorized to modify the award in this manner.

Since the jurisdiction of the National Railroad Adjustment Board is limited to the determination of the rights of the parties to existing agreements (45 U.S.C.A. § 153, First(i)), the Court's action in reducing damages to a nominal amount was clearly based on the conclusion that the award did not confine itself to matters within the Board's jurisdiction. As the Court of Appeals held in the prior case, involving indistinguishable facts, "The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act" (338 F. 2d 407, 409-410). The judgment rendered by the District Court is thus clearly within the review permitted by Public Law 89-456.

If the monetary aspects of the present award are not subject to the review authorized by the 1966 amendments, it is difficult to attribute any practical significance to the Congressional enactment. What clearer case can there be of an award which does not confine itself to matters within the Board's jurisdiction than the present one which is entirely silent as to the basis, contractual or otherwise, for the allowance of a full day's pay for each claimed violation? If the jurisdiction of the Adjustment Board rests on the contract rights of the parties, it is indisputable that there is not the slightest hint of such contractual rights to support the award of penalty damages in the present case. Moreover the award of a full day's pay, viewed as a compensatory allowance, is entirely without support in the evidence. As the District Court found, the claimants did not suffer any actual loss. The present case, therefore, clearly falls within the intended review described by the

Senate Committee at the time that Congress was considering the proposed amendments to the Railway Labor Act. There is not an iota of evidence to support the award of a full day's pay for each claimed violation.[1]

It is indisputable, therefore, that the Court of Appeals erred in holding that the 1966 amendments prohibit inquiry into the basis for the monetary aspects of the Award here involved. This mistaken view of the statute should be corrected before it gains further currency.

(2) The decision of the Court of Appeals reversing the judgment of the District Court on the basis of the subsequently enacted amendments to the Railway Labor Act is in conflict with decisions from other circuits and is contrary to established principles of statutory construction.

On December 28, 1966, the Court of Appeals held that the validity of the judgment of the District Court, entered on May 6, 1965, should be determined by reference to the amendments to the Railway Labor Act which were enacted into law on June 20, 1966. Although the appeal from the judgment of the District Court had been briefed and argued before the amendments were approved, the Court of Appeals chose to apply standards of judicial review based on its interpretation of the subsequent legislation. This decision is in conflict with decisions of two other Circuits which

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[1] If there is any question about the adequacy or significance of the District Court's findings and conclusions in the context of the 1966 amendments, that Court should be afforded an opportunity to pass on such questions. Surely the District Court is the best source of enlightment as to the meaning and purpose of its findings and conclusions. Before they are found to be inadequate under a statute enacted subsequent to the District Court's consideration of the controversy, some opportunity for reconsideration or explanation should be afforded.

have declined to accord retroactive effect to the 1966 amendments to the Railway Labor Act.

In *Hanson* v. *Chesapeake and Ohio Ry. Co.*, 367 F. 2d 134 (4th Cir. 1966), the Court of Appeals for the Fourth Circuit in a decision dated September 16, 1966, remanded comparable enforcement proceedings to the District Court "to determine the amount of damages to which each of the aggrieved petitioners is entitled" (*Id.* at 136). The Court's action was based on the holding of this Court in *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257 (1965), interpreting the Railway Labor Act prior to the 1966 amendments. Although the 1966 amendments were in effect when the Court of Appeals rendered its decision and had been effective since June 20, 1966, it is clear that the Court considered the *Gunther* decision rather than the 1966 amendments to be controlling as to the scope of review. Similar reliance upon the *Gunther* decision rather than the 1966 amendments is indicated by the decision of the Court of Appeals for the Fifth Circuit in *J. H. Hodges and Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 363 F. 2d 534 (5th Cir. 1966), in an opinion dated July 13, 1966. In remanding to the District Court, the Court of Appeals stated:

> "The District Court has authority under the Railway Labor Act to determine the amount of that award as stated in Sub-division IV of the *Gunther* opinion." (*Id.* at p. 540.)

It is apparent that the Courts in these two pending cases have not given retroactive effect to the 1966 amendments to the Railway Labor Act. Both recognize the right of the District Courts to determine the amount of damages in contrast to the decision of the Court of Appeals that "the jurisdictional foundation for its judgment as to the amount of the award no longer exists" (App. A, p. 29).

The decision of the Court of Appeals is also contrary to the general rule of law and of statutory construction denying retroactive effect to legislative enactments. This Court recently reiterated this firmly established doctrine in *Greene* v. *United States,* 376 U.S. 149, 160, stating:

> "As the Court said in *Union Pac. R. Co.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199, 'the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."'"

See also: *Claridge Apartments Company* v. *Comm'r,* 323 U.S. 141; *Hagger* v. *Helvering,* 308 U.S. 389; *Winfree* v. *Northern Pacific Ry. Co.,* 227 U.S. 296; *United States* v. *Burr,* 159 U.S. 78; and *Reynolds* v. *McArthur,* 27 U.S. 417.

Neither in the statutory language nor in the legislative history is there the slightest indication of any intention that the 1966 amendments to the Railway Labor Act should be applied retroactively to invalidate judgments previously entered. Moreover, the retroactive application of the 1966 amendments has resulted in the denial of substantial rights which petitioner had under the pre-existing statute.

At all times during the pendency of this case before the Adjustment Board and in the District Court, the governing law clearly permitted the type of judicial review exercised by the District Court in this proceeding. The Rio Grande relied on the law as it existed, both before the National Railroad Adjustment Board and in the District Court. Substantial expense was incurred and much time was expended in trial of this case and during the appeal to the Court below. All of this has been nullified by the Court of Appeals in reliance on legislation which was enacted more than a year after the District Court had acted.

In an apparent effort to avoid the general rule that statutes should not be applied retroactively, the Court of Appeals referred to an exception which it considered applicable. The exception in question relates to repeal of a statute that confers jurisdiction of a cause upon a court without any reservation as to pending cases. Generally all cases pending when the repeal is accomplished fall with the law. The Court of Appeals relied upon this Court's decision in *Bruner* v. *United States,* 343 U.S. 112, in holding that the facts herein fall within that rule. In the *Bruner* case a civilian government employee sued the United States pursuant to the Tucker Act in a district court for overtime compensation allegedly due for official services. While the case was pending, an amendment to the Judicial Code was enacted which deprived district courts of jurisdiction over such cases. In light of the amendment removing judisdiction completely from the district courts, this Court held that the complaint was correctly dismissed for want of jurisdiction.

This jurisdictional rule, however, is not applicable here. No act was passed that removed the jurisdiction of the district court to hear this case. Under the Railway Labor Act both before and after the 1966 amendments, district courts had and continue to have jurisdiction over actions brought to enforce awards of the Adjustment Board.

The legislative history of the 1966 amendments to the Railway Labor Act (Public Law 89-456) indicates that the purpose of the amendments was to eliminate the right of the carriers to a trial de novo in a suit to enforce an Adjustment Board award (S. Rep. No. 1201, 89th Cong., 2d Sess. (1966)). Congress in eliminating this substantial right of the carriers sought to equalize for both the employees and employers the grounds for judicial review of an Adjustment Board award. In so doing Congress did

not intend to accomplish an elimination of jurisdiction such as that involved in the *Bruner* case. Accordingly, the jurisdictional rule illustrated by the *Bruner* case has no application here. The jurisdictional rule is limited to cases where jurisdiction for the entire cause of action has been removed. This Court clearly intimated as much in the *Bruner* case where it stated:

> "This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." (343 U.S. 112, 117, fn. 8.)

It is indisputable that the Court of Appeals erroneously applied the jurisdictional rule in according retroactive effect to the 1966 amendments to the Railway Labor Act.

Accordingly, certiorari should be granted in this matter in order to resolve the conflict between the Fourth and Fifth Circuits on the one hand and the Tenth Circuit on the other regarding the retroactive effect of the 1966 amendments to the Railway Labor Act, and to correct the lower court's mistaken application of the decision of this Court in the *Bruner* case.

(3) Public Law 89-456, relied upon by the Court of Appeals in this case, denies to carriers their common law right to a jury trial in a contract dispute where the amount in controversy exceeds twenty dollars and is thus contrary to the Seventh Amendment to the Constitution of the United States.

Prior to the enactment of Public Law 89-456, the Railway Labor Act provided that a money award of the Adjustment Board was not final and binding upon the parties and that a court suit to enforce such awards should proceed in all respects as other civil suits, except that on the trial of such

suit the findings and order of the Adjustment Board would be prima facie evidence of the facts therein stated (45 U.S.C.A. § 153 First (m) and (p), App. B, pp. 35-36). This Court in *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, recognized that while the Adjustment Board's non-money awards are final and binding in all respects the District Court nevertheless has the power to determine the size of a money award ". . . in a lawsuit which can, as the statute provides, proceed on this separable issue 'in all respects as other civil suits' where damages must be determined" (382 U.S. at 265). Thus, the express terms of the Railway Labor Act prior to the 1966 amendments and the *Gunther* decision interpreting the statute preserved the carriers' common law right to a jury trial in contract disputes as protected by the Seventh Amendment. The Seventh Amendment to the Constitution of the United States provides in pertinent part that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Public Law 89-456 as interpreted by the Court of Appeals now extinguishes this right of the carriers by making all the findings of the Board conclusive, including the size of money awards, with judicial review limited to the issues of whether the Adjustment Board complied with the provisions of the Act, whether the Board acted outside its jurisdiction, or whether there was fraud or corruption on the part of a member of the Board. Public Law 89-456 thus eliminates the carriers' common law right to a jury trial, as guaranteed by the Seventh Amendment and is unconstitutional.

Early in the development of the case law interpreting the Railway Labor Act, the courts recognized that the pro-

visions in the Act for a trial do novo in an enforcement action saved the Act from being unconstitutional. With respect to carrier claims that the Act was unconstitutional in that respect, see: *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810, 813 (S.D. Iowa, 1936); *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 244-245 (D.C. Cir. 1941), aff'd by equally divided court (319 U.S. 732).

Insofar as railroad employees are concerned, the legislative history of the Railway Labor Act and the relevant decisions suggest that the employees relinquished this right to a jury trial, with one exception.[1]

While this precise question was not before the Court, *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, does suggest that the employees had voluntarily relinquished the right to a jury trial in wage disputes.[2] In that case the issue before this Court was whether an employee could sue in a federal district court to recover damages for wrongful dis-

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[1] In *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, it was held that a discharged employee who had not filed a grievance before the Adjustment Board could sue in the courts for a common law remedy of damages. See also: *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653, and *Walker* v. *Southern Railway Co.*, 17 L. Ed. 2d 294. In *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, the Court held that the Adjustment Board has exclusive primary jurisdiction of a wage dispute, thus precluding any prior court action. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, decided the same day as the *Day* case, held that an employee was precluded from bringing a court action after unsuccessful prosecution of a claim for wrongful discharge before the Adjustment Board.

[2] The Court noted that the respondent, who was claiming wrongful discharge, did not argue that a holding that the Railway Labor Act precludes a relitigation of that claim in the courts would deprive him of any constitutional right to a jury trial since, under *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, he could have brought the action originally in a court. 360 U.S. at 607, fn. 6.

missal after denial of his claim by the Adjustment Board. This Court held that the award of the Adjustment Board denying relief was binding upon the employee, thus precluding him from relitigating the same issues in a common law damage suit. In so holding, the Court discussed the legislative history concerning §§ 3 First (m) and (p), (45 U.S.C.A. §§ 153 First (m) and (p)) which allowed a trial de novo in an action to enforce a money award in favor of the employee, but which made a finding by the Adjustment Board against the employee final and binding:

> "The labor spokesman for the proposal made it crystal clear that an essential feature of the proposal was that Board awards on grievances submitted by or on behalf of employees were to be final and binding upon the affected employees. The employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances." (360 U.S. at 613.)

There is no evidence, however, that the carriers intended to give up their right to a trial by jury as preserved by the Seventh Amendment to the United States Constitution. The legislative history of Public Law 89-456 indicates that the purpose of the 1966 amendments to the Railway Labor Act was to eliminate the right of the carriers to a trial de novo in an action to enforce an Adjustment Board award. This was not based on any voluntary relinquishment by the carriers of their rights under the Seventh Amendment. Congress sought instead by legislative fiat to establish for both employees and employers identical grounds for judicial review of an Adjustment Board award (S. Rep. No. 1201, 89th Cong., 2d Sess. (1966)).

In *Pennsylvania R. Co.* v. *Day,* 360 U.S. 548, 560-563, Justice Black, in a dissenting opinion, recognized the serious constitutional issue involved in the deprivation of a

jury trial in a wage dispute under the Railway Labor Act, stating:

> "It would surely not be easy to uphold the constitutionality of a procedure which takes away from both parties to a wage dispute their ancient common-law right to a trial by court and jury." (360 U.S. at 561-562.)

This Court's recent decision in *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, does not discuss the issue of the carriers' right to a jury trial pursuant to the Seventh Amendment in actions to enforce awards of the National Railroad Adjustment Board. The *Gunther* decision, however, preserved the right of the carriers to a jury trial regarding the amount of a money award, and consequently avoided the constitutional issue raised by the 1966 amendments.

We respectfully submit that this Court should resolve the serious constitutional issue raised by the elimination through Public Law 89-456 of the carriers' common law right to a jury trial, as preserved by the Seventh Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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